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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL D. FRIEDMAN, Plaintiff, vs. OLD REPUBLIC HOME PROTECTION COMPANY, INC., Defendant.	Case No. EDCV 12-1833 AG (OPx) **DEFENDANT OLD REPUBLIC HOME PROTECTION COMPANY, INC.'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION** DATE: MARCH 30, 2015 TIME: 10:00 AM DEPT: 10D JUDGE: HON. ANDREW J. GUILFORD

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I. INTRODUCTION

Plaintiff Michael D. Friedman's ("Plaintiff") Motion for Class Certification ("Motion")[1] should be denied. The Motion, which seeks to certify claims for violation of the Unfair Competition Law, CAL. BUS. & PROF. CODE, §§ 17200 *et seq*. ("UCL") and the False Advertising Law, *id*. §§ 17500 *et seq*. ("FAL") on behalf of a national class of persons covered by a home warranty plan ("Plan") issued by Old Republic Home Protection Company, Inc. ("ORHP") since November 24, 2004—more than 2.26 million people just since 2008—is simply a rehash of virtually identical claims in the *Campion* case brought by this same Plaintiff's counsel, in which the court denied: (i) a similar Rule 23 motion to certify an even narrower class; (ii) a motion to reconsider the denial of that motion to certify; and (iii) an eleventh hour motion to amend the complaint to try to broaden the class definition for a third time.[2] Plaintiff's Motion is at least as deficient.

The size of the putative class and breadth of challenged advertisements and conduct in this case are astonishing. Plaintiff's UCL and FAL claims are not based on a single representation, but instead on a multitude of claimed deceptive ads and marketing messages made through dozens, if not hundreds, of written and oral communications that were directed to various channels, including directly to plan-holders for renewal purposes, as well as to intermediaries such as real estate brokers and agents who promoted home warranties. While such an incredibly broad class definition assures Plaintiff of satisfying the Rule 23(a) numerosity requirement, it has simultaneously made it impossible for Plaintiff to satisfy the Rule 23(b) predominance and superiority requirements, as well as several other aspects of the Rule.

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[1] *See also* Plaintiff's brief in support of the Motion (Doc. 74-3) ("Br.").

[2] *See* Docs. 53, 64, and 93 in *Campion v. Old Republic Home Prot. Co., Inc.*, No. 09-cv-748-JMA(NLS)(S.D. Cal) ("*Campion*"). Plaintiffs' counsel has sued ORHP's competitors on similar grounds. *See* Doc. 114 in *Diaz v. First Am. Home Buyers Prot. Corp.*, No. 09-CV-0775 H (WMC)(S.D. Cal.) (denying similar class certification motion and citing *Campion* with approval). Class counsel also has another pending certification motion against First American in *In Re First American Home Buyers Protection Corporation Class Action Litigation*, No. 13-CV-1585 BAS(JLB)(S.D. Cal), and has pursued similar claims against other home protection companies, including Fidelity National Home Warranty Company, in state court. The *Diaz* and *Campion* courts were not impressed with the class certification analysis in the state court decisions.

Plaintiff offers no proof, and cannot possibly show, that class members were exposed to the same specific material representations. Plaintiff himself cannot remember what was represented to him or when. Likewise, the representations that Plaintiff has discerned from the ads that he believes are false (*e.g.*, that ORHP will repair and replace; that it provides excellent customer service; that it uses reliable and qualified contractors; that its Plan provides budget protection and facilitates home sales) would clearly raise predominant individualized issues in determining whether ORHP's practices lived up to these propositions in the hundreds of thousands of different types of claims, involving hundreds of different contractors, and several different levels of coverage. Moreover, this Court has already ruled that many of the challenged representations are puffery.

In addition, Plaintiff has no workable methodology to adjudicate his claim for restitution. It is well established that many class members never even made claims under their plans, and many others made claims that were satisfactorily handled. Indeed, the difficulties with this suit can be seen by the experience of Plaintiff himself, who made various claims while he was a plan-holder that were handled satisfactorily by reliable and competent contractors such that he renewed his policy twice and tried to renew it a third time. These and other deficiencies are discussed below.

II. PROCEDURAL POSTURE

At the same time Plaintiff's counsel in *Campion* was noticing the appeal in that case to the Ninth Circuit,[3] it filed the Complaint in this case in the Superior Court of California for the County of Riverside, making the same set of allegations and presenting

[3] The Ninth Circuit rejected Campion's appeal in a split decision. *See Campion*, 775 F.3d 1144 (9th Cir. Dec. 31, 2014). Two of the judges held that *Campion* had settled his individual claim without preserving any stake in the class claim, such that the court lacked jurisdiction over the appeal. *Id.* Judge Owens thought that the appeal should have been heard but that Campion would have lost anyway because: (i) he lacked standing to pursue injunctive relief because his contract expired before he filed suit (*id.* (citing *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1021-22 (9th Cir. 2004)); and (ii) because the district court had correctly denied class certification. *Id.*

the same issues as in *Campion*.[4] After the case was removed to this Court, several important rulings were made that are relevant to the present Motion.

On September 9, 2013, this Court dismissed Plaintiff's claims for fraud by concealment (Claim Two) and promissory fraud (Claim Three) without prejudice. (Doc. 29, at 12.) The Court was concerned that the allegations in Claim Two did not plead an intent to defraud and would not fall within a duty to disclose (*id.* at 9-10)—a concern that is equally applicable to Plaintiff's contention that ORHP violated Insurance Code § 332. (*See* Doc. 30, ¶ 123-4.) The Court initially dismissed Claim Three because it agreed that the statements allegedly capable of falsity were puffery. (Doc. 29, 10-11.)

On October 9, 2013, Plaintiff filed an amended complaint re-pleading his concealment and promissory fraud claims. (Doc. 30.) The Court dismissed with prejudice the concealment claims relating to Plaintiff's contentions, *inter alia*, regarding ORHP's failure to disclose alleged deficiencies in its contractor ranking system, discouragement of contractor replacements, service delays, claims evaluation bias, and refusal to prevent the charging of excessive fees. (Doc. 40.) The Court reiterated its belief that ORHP had no underlying duty to disclose (*id*. at 4-5), and dismissed the promissory fraud claims again, granting leave to amend. (*Id*. at 6-7.)

Thereafter, Plaintiff sought leave to amend and include another concealment claim *but not a promissory fraud claim*. (*See* Doc. 48, at 9-11.) With this new claim, Plaintiff proposed new allegations regarding alleged unlawful commissions that ORHP supposedly gave to real estate agents promoting its Plans, although Plaintiff did not contend that his real estate agent was among these agents. (*Id*. at 12-14.) Accordingly, the Court denied Plaintiff leave to amend, thereby dismissing his fraud claims. (Doc. 52.)

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[4] Campion did not expressly plead a § 17500 FAL claim. Yet it is clear that the court viewed his UCL and fraud claims as grounded in false advertising. Thus, in its initial class certification denial, that court: (i) noted Campion's class allegation that ORHP's "advertisements were disseminated via uniform written materials" (*Campion* Doc. 56, at 7); and (ii) refuted—in an opinion section labeled "The Fraudulent/False Advertising Prong"—the very arguments about the same claimed false ads that Plaintiff makes here. (*Id*. at 21-26.) Campion subsequently attempted to amend his complaint to formally allege false advertising, but the court denied the motion, saying *inter alia* that "Plaintiff's Complaint, in fact, already includes a cause of action for intentional misrepresentation and concealment and a UCL claim, ***which are both predicated on Plaintiff's allegations of deceptive advertising***." *Campion* Doc. 93, at 16 (emphasis added).

Plaintiff's Motion seeks to certify claims under California's UCL and FAL on behalf of ORHP customers—not only in California but throughout the United States—for a time period going back to 2004. Such claims raise obvious statute of limitation defenses and individualized issues with respect to a myriad of ads targeted at different customer segments for different purposes, almost none of which Plaintiff can even recall seeing before his specific Plan purchase and renewals.

III. STATEMENT OF FACTS

A. ORHP's Home Warranty Business And Plans

ORHP is one of the country's largest home warranty companies. (Declaration of Gwen Gallagher ("Gallagher Dec.") at ¶ 2.) It is licensed in approximately 45 states and currently actively markets in approximately 22 states. (Declaration of Tony Tootell ("Tootell Dec."), Ex. A (Deposition of Lorna Mello ("Mello Dep.") at 18:4-6).) Subject to exclusions, Plans provide for "repair or replacement" of covered systems and appliances that malfunction during the Plan period due to "normal wear and use ." (Tootell Dec. Ex. D (Deposition of Gary Vistalli ("Vistalli Dep.") at Ex. 4).) The Plans expire after one year, but can be renewed if eligible. (*Id.*)

1. Variations In ORHP's Home Warranty Plans

The costs for a Plan vary by state, within a given state, and depending on the level of coverage a plan-holder selects. (Gallagher Dec. ¶ 3.) Each plan-holder selects a specific level of coverage, and agrees to the terms, exclusions, and limitations of liability related to his contract with ORHP. (Tootell Dec. Ex. D (Vistalli Dep., Ex. 4.)) For example, "standard coverage," is applicable only to single-family dwellings under 5,000 square feet. (*Id*. at 9.) Beyond standard coverage, ORHP offers upgraded package coverages and at least 10 other optional coverages, for an additional premium. (*Id.*)

2. Since 2013 ORHP's Plans Have Contained Arbitration Provisions

In May 2013, ORHP began including arbitration provisions in its plans nationwide.

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(Gallagher Dec. ¶ 4.) This provision requires that "[a]ll disputes of claims between the parties arising out of the agreement or the parties' relationship shall be settled by final and binding arbitration held in the county of the customer's address." (Tootell Dec. Ex. D (Vistalli Dep. Ex. 4).) But if the claim is less than $10,000, either party may bring an action in small claims court. (*Id.*) ORHP has regularly resolved plan-holder claims or disputes via negotiation, small claims court, and other litigation. (*Id.*)

B. The Marketing and Advertising of ORHP's Plans

1. ORHP Sells Plans Through Different Channels

[redacted]

2. ORHP Advertises Through Various Mediums

ORHP markets and advertises through many different mediums including print advertisements; online advertising; email advertising; in-person advertising through meetings with intermediaries such as real estate brokers and agents or at trade shows, and call center and other phone communications. (Tootell Dec. Ex. A (Mello Dep. at 23:7-13; 35:7-14), Ex. M (Deposition of Kathy Landsford ("Lansford Dep.") at 38:7-12).)

[redacted]

[redacted]

3. The Plans Are Often Not Purchased By The Customer

Because ORHP's customers primarily obtain their Plans in connection with a real estate transaction, a plan-holder does not necessarily purchase or select the Plan, or even the home warranty company. (Gallagher Dec. ¶ 6.) For example, a buyer's agent might negotiate for the seller to purchase a Plan, a Plan may be offered by the seller's broker as an enticement, or a Plan may be requested by the home buyer himself. (*Id*. at ¶ 5.)

When a Plan is purchased as part of a real estate transaction, ORHP does not know or record who purchased the Plan or made the purchasing decision. (*Id*. at ¶ 7.) Contacting the individual closing company and reviewing each individual transaction might yield limited answers regarding who paid for the Plan, but not necessarily who decided to purchase it or why. (*Id*. at ¶ 7.)

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C. ORHP'S Claims Administration and Contractor Network

1. Plans Only Cover "Normal Wear and Use"

"Coverage" is a term of art that requires reference to the Plan itself. (Tootell Dec. Ex. D (Vistalli Dep. Ex. 4).) As an example, the Plan generally provides that ORHP will repair ***or*** replace covered systems or appliances that were properly installed and in good and safe working order on the plan's effective date, where the claim is reported during the plan term. (*Id.*) The Plan does not guarantee that a homeowner will always have a broken appliance entirely replaced with a new one. (*Id.*, *see also* Tootell Dec. Ex. B (Vistalli Dep. at 94:3-9.) An informed judgment call may be necessary to determine whether an appliance can be repaired to working order as the manufacturer intended, or whether replacement of the appliance is required. (Tootell Dec. Ex. E (Deposition of Gary Vistalli in *Campion* ("Vistalli *Campion* Dep.") at 56:7-57:13, 140:3-141:15.) ORHP's contractual obligation is fulfilled as long as the appliance is returned to operability as the manufacturer intended. All service work is guaranteed for 30 days. (Tootell Dec. Ex. D (Vistalli Dep. Ex. 4).) The Plans include other largely common sense limitations of liability for acts that fall outside of "normal wear and use" (*e.g.*, "vandalism," improper previous or attempted repair," "misuse") (*Id.*)

2. The Majority of ORHP Customers Are Never Denied on a Claim.

[redacted]

3. ORHP Internally Classifies Most Replacements as Repairs

[redacted]

[redacted]

When servicing a claim, the independent contractors assess whether it is both possible and appropriate, under the specific circumstances, to repair a broken system or appliance rather than replacing it. (Gallagher Dec. ¶ 9.) For example, if a refrigerator component such as an icemaker is malfunctioning but the refrigerator otherwise works, ORHP would expect the contractor to first attempt to repair the icemaker, rather than recommending the replacement of the icemaker or the entire refrigerator. (*Id.*)

4. ORHP's Network of Independent Service Providers

ORHP's contractors are insured, licensed, and counseled about ORHP procedures and customer service. (Gallagher Dec. ¶ 8.) ORHP encourages contractors to offer competitive rates, while providing quality customer service. (*Id*. at ¶ 12; *see also* Tootell Dec. Ex. O (Deposition of Rocco Volpe in *Campion* ("Volpe Dep.") at 34:2-16).). But contractors are not ranked on their denial rate, nor are they encouraged to deny claims as a means to improve their ranking. (Gallagher Dec. ¶ 12; Tootell Dec. Ex. E (Vistalli *Campion* Dep. at 82:2-83:5).) [redacted] While Plaintiff complains that the old system did not value "customer service and quality" (*e.g.*, Amended Complaint at p. 13, fn. 2 and ¶ 140(d); Br. at 10-11), the new ranking system sought to simplify and streamline the prior one (Tootell Dec. Ex. B (Vistalli Dep. at 44:9-11)) and emphasize improving quality through one-on-one consultations rather than statistics. (Gallagher Dec. ¶ 11.)[5]

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[5] [redacted]

Contractors are regularly monitored and coached by a contractor service representative. (Tootell Dec. Ex. E (Vistalli *Campion* Dep. at 146:9-22).) Contractors are removed from the network by ORHP for a number of reasons, including failing to adhere to customer service requirements. (*Id.* at 146:24-147:14.)

a. Contractors Have No Financial Incentive to Deny Claims

Contractors have no financial incentive to deny claims, nor do they have any economic incentive to shift the costs of work to the consumer. ORHP contractors have testified that they make more money on a covered claim. (Tootell Dec. Ex. O (Volpe Dep. at 36:17-37:19; 30:24-31:17).) Furthermore, when ORHP denies a claim, the customer typically will not hire the contractor back at a "retail" rate for any upgrades or future work because "they are mad at [the contractor] for giving the report." (Tootell Dec. Exs. L, N, and O (Deposition of Douglas Campion in *Campion* at 38:20-25; Rodio Dep. at 117:20-118:6; Volpe Dep. at 37:23-38:4.)

b. Contractors Do Make a Profit On Home Warranty Work

Plaintiff's specious theory of liability is largely premised on the notion that ORHP "pays its contractors far less than what they would normally make in the retail market." (Br. at 15:11-12.) ORHP always wants its service providers to charge fair pricing. (Tootell Dec. Ex. B (Vistalli Dep. at 54:17-18).) This is supported by the sworn testimony of Oasis Plumbing to the effect that home warranty work in contrast to commercial and industrial work is easy and working for ORHP eliminates most of the advertising he does and provides a steady stream of work. (Tootell Dec. Ex. O (Volpe Dep. at 49:18-51:3).)[6]

D. Plaintiff's Plan Purchase and Claims

1. Home Warranty Purchase

Plaintiff purchased a home on Avenida Madero in La Quinta California on July 24,

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[6] Volpe also testified that he prefers covered claims because satisfied customers may call him back for non-repair work—*i.e.*, new toilets or an upgrade of sink and faucets. (Tootell Dec. Ex. Q (Volpe Dep. at 49:18-51:3).)

2008 (“Madero House”) and obtained an upgraded Plan with air conditioning coverage in connection with this purchase. (Tootell Dec. Exs. F, G (Deposition of Michael D. Friedman (“Pl. Dep.”) at 8:23-9:1; 9:11-13; Ex. 2 at PLTF00003.) The effective date of Plaintiff’s original Plan was the same date as his closing (July 24, 2008) and it expired on July 24, 2009. (*Id*. at Ex. I (PLTF00003);

Plaintiff did not order his Plan; rather, it was ordered by his real estate agent, Stephen Powell, who represented Plaintiff in the Madero House purchase. (Tootell Dec. Ex. F (Pl. Dep. at 27:4-23; 48:3-13; 53:18-22).) Plaintiff cannot remember specifically what Mr. Powell told him about the Plan. (*Id*. at 46:20-47:7.) He recalls generally that Mr. Powell recommended the Plan and ORHP. (*Id*. at 27:24-28:3; 47:9-11.) He recalls Mr. Powell telling him it was a great Plan and that he would be taken care of. (*Id*. at 28:1-3.) Plaintiff also recalls that Mr. Powell explained that the Plan provides protection if covered items go wrong. (*Id*. at 47:18-21.)

Plaintiff also does not recall how he obtained a copy of the Plan itself, and while his testimony is inconsistent, he seems to believe it was by mail or was given to him by Mr. Powell. (*Compare id*. at 29:8-14 with *id*. at 48:18-52:18; 51:51:7-9; 199:19-200:8.) Other than a brochure and the Plan, Plaintiff does not recall seeing any other ORHP flier. (*Id*. at 136:14-19; *see also id*. at 184:22-185:16.) He does not recall seeing any ORHP advertisements. (*Id*. at 136:21-137:2.) Plaintiff does not recall having any conversations with Mr. Powell about the ORHP brochure. (*Id*. at 49:3-5.) Plaintiff testified that he visited the ORHP website at some point before his Plan was ordered (*id*. at 50:5-16), but he does not know what he saw. (*Id*. at 50:17-21.)

The Plan provided, *inter alia*, that covered systems that became inoperable due to normal wear and use during the contract term would be repaired or replaced at the discretion of ORHP, or that the plan-holder would be provided with cash in lieu of repair or replacement, at ORHP’s discretion. (*See* Tootell Dec. Ex. G (Pl. Dep. Ex. 2 at PLTF00026)(“We have the sole right to determine whether a covered system, appliance, or component will be repaired or replaced…”). It called for the plan-holder to submit a claim to ORHP for items that he believed should be covered. (*Id.* ("The services contracted for will be initiated under normal circumstances by us within 48 hours after your request for service is made. Emergency service . . . will be initiated no later than 24 hours after the report of the claim in the event of an emergency").)[7] The Plan also provided for "installation of equipment comparable in features, capacity, and efficiency, but not [ ] matching dimensions, color, or brand." (*Id.*)

After the initial term, Plaintiff renewed his Plan for two additional one-year terms. (Tootell Dec. Ex. F (Pl. Dep. at 53:18-22).) The first renewal was ordered by Plaintiff, through email, and was effective from July 24, 2009 to July 24, 2010. (Tootell Dec. Exs. F, G, J (Pl. Dep. at 35:14-36:17; Ex. 2 at PLTF00015; Ex. 9 at p. 1.) He paid $535 for the renewed Plan, which included standard coverage plus silver, gold, platinum, and air conditioner upgrades. (Tootell Dec. Exs. F, G (Pl. Dep. at 36:20-37:3; Ex. 2 at PLTF00015.) Plaintiff testified that when he renewed the Plan in 2009, he received some kind of information from ORHP, reviewed it, and then decided to renew. (Tootell Dec. Ex. F (Pl. Dep. at 106:122).) Plaintiff does not recall what information he received and reviewed prior to renewal, but that it may have included a letter and some kind of pamphlet. (*Id.* at 106:22-107:13; 108:12-21.) Plaintiff produced his Plan renewal materials, but they do not contain any of the challenged representations. (*See* Tootell Dec. Exs. G, H (Pl. Dep. Ex. 2 at PLTF00005-8, Ex. 7 at PLTF000036-39.)[8] Plaintiff also believes he may have spoken with an ORHP representative before he renewed, but does not recall that conversation. (Tootell Dec. Ex. F (Pl. Dep. at 107:15-109:1).) He may have also looked at the ORHP website, but does not recall any substance. (*Id.* at

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[7] The Plan explained that "[f]or each new trade call placed, you will be responsible to pay the trade call fee to the contractor at time of the first visit" and that failure to pay the trade call fee would "result in suspension of coverage until such time as the proper fee is paid." Service work is guaranteed for 30 days. (*Id.*)

[8] Plaintiff produced a total of 45 pages of documents in this case, many of which are duplicative. A review of his production confirms that other than (arguably) the Plan itself, it contains few—if any—of the of the advertisements, communications, fliers, and brochures about which he complains. *See* Tootell Dec. Exs. G and H.

109:2-11.)

Plaintiff's second renewal was effective from July 24, 2010 to July 24, 2011. (Tootell Dec. Exs. F, G (Pl. Dep. at 121:16-22, Ex. 2 at PLTF00001, 5-11.) He paid $535 for the renewed Plan, which included standard coverage plus silver, gold, platinum, and air conditioner upgrades. Tootell Dec. Ex. G (Pl. Dep. Ex. 2 at PLTF00001).) Plaintiff believes he received some written ORHP material prior to this second renewal but he does not know what. (Tootell Dec. Ex. F (Pl. Dep. at 113:3-114:8).)

Plaintiff sought to renew his Plan a third time in 2010. (*Id*. at 133:13-15.) However, ORHP chose not to renew the Plan, such that Plaintiff is no longer a plan-holder and does not desire to be one. (Tootell Dec. Exs. F, K (Pl. Dep. at 135:5-8; Ex. 10 at pp. 8-9.)

2. Plaintiff's Policy Claims

Air conditioning Claims. The gravamen of Plaintiff's lawsuit is his policy claims concerning a Lenox air conditioner that conveyed with the purchase of the Madero House. Plaintiff testified that between 2008 and 2011, he made at least six calls to ORHP regarding issues with his air conditioner, several of which he believes were for "the same problem[.]" ((Tootell Dec. Ex. F (Pl. Dep. at 103:6-16).)

On August 19, 2008, Plaintiff made a call to ORHP to complain that his air conditioner was noisy and not cooling properly. (Tootell Dec. Ex. F, I (Pl. Dep. at 79:16-20; Ex. 8 at p. 2).) Plaintiff advised ORHP that he needed his request expedited due to medical issues, and ORHP transferred the service call to a contractor that could respond that very day. (Tootell Dec. Ex. I (Pl. Dep. Ex. 8 at p. 2).) Cavanaugh Electric & AC was dispatched that day, and recommended replacement of the compressor and condenser fan motor. (*Id*. at pp. 2-3.) The estimate for the work was $773.74, which ORHP authorized in full. (*See id*. at p. 3.) The work was completed on August 21, 2008. (*Id*.) On September 2, 2008, ORHP contacted Plaintiff, who confirmed that the repair was completed and the air conditioner was operating. (*Id*.)

On June 26, 2009, Plaintiff called ORHP to report that his air conditioner would not turn on. (*Id*. at p. 6.) ORHP honored Plaintiff's request to choose his own contractor to make sure the unit was serviced that same day. (*Id*. at pp. 6-7; Tootell Dec. Ex. F (Pl. Dep. at 97:10-22; 102:14-16).) Plaintiff's contractor identified and repaired a broken fuse. (*Id*. at p. 7.) The contractor gave an estimate of $165 for the work, which ORHP reimbursed less the $55 trade call fee, for a net reimbursement of $110. (*Id*. at 7-8.)

On June 26, 2010, Plaintiff called ORHP to report that his air conditioner would not turn on. (Tootell Dec. Ex. J (Pl. Dep. Ex. 9 at p. 3).) A work order placed with Brothers Air Conditioning & Heating ("Brothers") was canceled the same day based on Plaintiff's request for a different contractor. (*Id*.) Nevertheless, Plaintiff requested same day service, and the work order was coded as a priority. (*Id*. at p. 4.) When ORHP was unable to locate a contractor to provide service that day, it authorized Plaintiff to contact a contractor of his choice. (*Id*. at pp. 4-5.) ORHP did not receive subsequent word from Plaintiff or an independent contractor regarding that service request. (*See id*. at p. 5.)

On July 12, 2010, Plaintiff called ORHP to report that his air conditioner was not cooling. (*Id*.) The next day, Plaintiff opted to have ORHP place the work order with one of its contractors so that Plaintiff could avoid upfront repair costs, stating that this issues was totally unrelated to the one made the previous month, such that he did not need to recall the contractor he had contacted independently. (*See id*.) Brothers was dispatched and reported problems with the compressor, high pressure switch, and fusible disconnect, and indicated that it would contact ORHP with pricing so a decision could be made whether to repair or replace the unit. (*Id*. at pp. 5-6 .) On July 14, Brothers estimated $895 in repair costs, including a non-covered $400 cost for a crane to place the new compressor on the roof. (*Id*. at p. 7.) That same day, ORHP advised Plaintiff of the $400 non-covered cost, and offered him a cash settlement of $1,456 in lieu of repair or replacement. (*Id*. at pp. 8-9.) Plaintiff declined the cash offer and agreed to the quoted repair, requesting that the contractor locate additional help so that the non-covered crane cost could be avoided. (*Id*. at p. 9.) Brothers replaced the compressor and addressed some power and electrical issues. (*See id*. at pp. 11-12.)

On July 17, 2010, Plaintiff called ORHP to report that his air conditioner was not working. (*Id*. at p. 13.) B&E Appliance Heating & Air ("B&E") was dispatched, and diagnosed the new compressor as having been installed incorrectly by Brothers. (*Id*. at pp. 13-14.) Noting other problems and the possibility that improper installation could have voided the manufacturer warranty on the compressor, B&E recommended replacing the unit. (*Id*. at pp. 14-15.) ORHP engaged in a dialogue with Brothers about the installation and warranty on the new compressor. (*See id*. at pp. 16-19.) On July 21, 2010, California Express Enterprises Inc. was dispatched, and reported that the compressor was improperly installed and the suction line was not welded properly during installation, allowing debris to enter the system; it also recommended replacement. (*Id*. at pp. 19-21.) However, on July 23, 2010, Brothers was able to repair the compressor under warranty, and Plaintiff reported to ORHP that the unit was working. (*Id*. at p. 21.)

On November 21, 2010, Plaintiff called ORHP to report that his furnace—part of the same air conditioning system—was blowing cold air. (Tootell Dec. Ex. K (Pl. Dep. Ex. 10 at p. 1).) Barnett's AC was dispatched the same day and reported various problems with the unit, including a clogged metering device, lack of wiring for heat, and age; it ultimately recommended replacement. (*See id*. at pp. 2-3.) On November 23, Plaintiff called ORHP to request replacement, and was initially advised that the reported failures were repairable and likely did not warrant replacement, and that a review of the history showed that ORHP had spent $2,952.00 on the HVAC system to date. (*Id*.) However, the next day, a supervisor reviewed the history and authorized replacement and a new unit was ordered. (*Id*. at p. 3.) The same day, Plaintiff accepted a quote for replacement by Barnett's AC, including a $250 non-covered charge. (*Id*. at p. 4.)

On December 2, 2010, Barnett's AC installed a new Payne air conditioner. (*See id*. at p. 6.) Plaintiff made several complaints to ORHP about noise and vibration. (*See id*. at pp. 6-8.) Barnett's AC was dispatched and placed rubber pads under and a compressor blanket around the unit, and advised that it was not aware of anything further that could be done to reduce the noise. (*Id*. at p. 8.)

Plaintiff concedes that ORHP replaced his air conditioner, but challenges the quality of replacement. (Tootell Dec. Ex. F (Pl. Dep. at 90:15-91:6); *cf*. Tootell Dec. Ex. G (Pl. Dep. Ex. 2 at PLTF00026) ("We have the sole right to determine whether a covered system, appliance or component will be repaired or replaced . . . We are responsible for providing installation of equipment comparable in features, capacity, and efficiency, but not for matching dimensions, color, or brand."). Plaintiff contends that the Payne is of lesser quality than the Lennox, and he complains that the Payne is noisier than the Lennox and causes more vibration. (Tootell Dec. Ex. F (Pl. Dep. at 163:24-165:20).) When Plaintiff purchased the Madero House, it had a Lennox brand 5 ton air conditioner, located on the roof. (*Id*. at 70:9-11; 90:6-11; 78:6-8.) The original Lennox equipment had an efficiency (SEER) rating of up to 12.5 and a decibel rating of 84 (Gallagher Dec. ¶ 13), with the lower the decibels the quieter the air-conditioner. That equipment was replaced with a Payne brand 5 ton air conditioner that had a better efficiency (SEER) rating of up to 13.5 and a better decibel rating of 76. (*Id*.) A comparable Lennox 5 ton 13 SEER package unit would have a decibel rating of 80. (*Id*.)

Plaintiff's Other Claims. Between 2008 and 2011, Plaintiff made numerous calls to ORHP for issues other than his air conditioner and received satisfactory resolution. (Tootell Dec. Ex. F (Pl. Dep. at 70:14-23); *see also* Tootell Dec. Exs. I, J, K (Pl. Dep. Exs. 8, 9, 10).) For example, he recalls making calls for issues relating to his toilet, garage door, and water heater. (Tootell Dec. Exs. I, J, K (Pl. Dep. Exs. 8, 9, 10).) Plaintiff acknowledges that his toilet was repaired to his satisfaction (Tootell Dec. Ex. F (Pl. Dep. at 71:1-72:23)) and that he has no complaints regarding the contractors that serviced it. (*Id*. at 73:9-16.) Likewise, the broken garage door springs were replaced to Plaintiff's satisfaction (*id*. at 72:24-73:8), and he had no complaints about those contractors. (*Id*. at 73:9-16.) In October 2008, a contractor was dispatched in response to Plaintiff's report that the water heater ran out of hot water too quickly. It diagnosed the water heater as operating as designed, but that to provide more hot water to all areas of the home, Plaintiff would need to install a re-circulating pump, a non-covered service.

(Tootell Dec. Ex. K (Pl. Dep. Ex. 8 at p. 4).) Records also reflect claims in December 2008 and July 2009 for various additional plumbing issues, each of which resulted in the dispatch of contractors to provide services. (*See* Tootell Dec. Exs. I, J (Pl. Dep. Exs. 8, 9).) In July 2009, for example, contractors repaired a clogged sink faucet, replaced Plaintiff's garbage disposal, replaced a toilet flange, and replaced leaking pipes under the kitchen sink. (Tootell Dec. Ex. I (Pl. Dep. Ex. 8 at pp. 7-8.) Plaintiff acknowledges that the trade call fees he was charged on the issues other than his air conditioner were appropriate and consistent with his expectations (Tootell Dec. Ex. F (Pl. Dep. at 105:4-20)), and this lawsuit challenges the air conditioner issues only. (*Id*. at 74:21-75:12.)

IV. ARGUMENT

A. Standards For Class Certification

A party seeking class certification bears the burden of affirmatively demonstrating, by a preponderance of the evidence, that the proposed class satisfies each of the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b). *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979-80 (9th Cir. 2011); *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588-89 (9th Cir. 2012). Certification should only be granted if, "after a rigorous analysis," the court determines that the proposed class satisfies these requirements. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (internal quotations and citation omitted); *see also Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule." *Dukes*, 131 S. Ct. at 2551. Thus, "it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Id.*; *see also In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 319 (3d Cir. 2008)(same).[9]

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[9] Indeed, an increasing number of courts require a party requesting class certification to present a trial plan in advance. *See* Fed. R. Civ. P. 23 2003 Advisory Committee's note; *see also Wilson v. Navika Capital Group, LLC*, No. 4:10-CV-1569, 2014 U.S. Dist. LEXIS 76468, at *23 (S.D. Tex. June 4, 2014) (in a Fair Labor Standards Act collective action, granting defendant's motion for decertification following plaintiffs' failure to present a workable trial plan); *Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1, 27 (2014)

B. Plaintiff Does Not Satisfy Rule 23(b)(3)

Plaintiff seeks certification under Rule 23(b)(3), but he does not come close to satisfying its requirements. Certification pursuant to Rule 23(b)(3) requires Plaintiff to establish that "the questions of law or fact common to class members predominate over any questions affecting only individual members" and that a class action is superior to other methods of adjudication. Fed. R. Civ. P. 23(b)(3). To satisfy the predominance inquiry under Rule 23(b)(3), Plaintiff must show more than the mere existence of common questions or law or fact; he must show that such questions *predominate*. *Dukes*, 131 S. Ct. at 2556 (emphasis in the original). Here the opposite is true: individual issues abound in this case and will predominate over any common issues that may exist.[10]

1. Individual Issues Predominate As to Plaintiff's False Advertising Claims under the UCL and FAL

To state a claim under the UCL or FAL based on false advertising, Plaintiff bears the burden of establishing that the alleged conduct was "likely to deceive" a reasonable consumer. *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995); *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508, 129 Cal. Rptr. 2d 486 (Cal. App. 2003). To meet this standard, Plaintiff must show that "a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Lavie*, 105 Cal. App. 4th at 508. In addition, he must also establish some loss or deprivation of money or property sufficient to qualify as injury in fact and show that the injury was the result of (*i.e.*, caused by) the challenged conduct. *Kwikset Corp. v.*

(strongly suggesting that class counsel present a viable trial plan at the time of certification).

[10] It is well-established that the Rule 23(b)(3) predominance requirement is "more demanding" than the Rule 23(a) "threshold" requirements. *See Dukes*, 131 S. Ct. at 2565. Yet Plaintiff cannot even meet the Rule 23(a)(2) commonality requirement as interpreted by the Supreme Court in *Dukes*, which requires that the common questions "resolve an issue that is central to the validity of each of the claims" "in one stroke," yielding a "common *answer[]*." *Id*. at 2551(citation omitted and emphasis in original). Plaintiff cannot show that the claimed common questions (*e.g.*, was there exposure, was there reliance, was there falsity) will yield common answers across the proposed class.

Super. Ct., 51 Cal. 4th 310, 322, 120 Cal. Rptr. 3d 741, 246 P. 3d 877 (2011).[11]

Although relief is available under the UCL or FAL without individualized proof of deception, reliance, or injury (*In re Tobacco II Cases*, 46 Cal. 4th 298, 320, 93 Cal. Rptr. 3d 559, 207 P. 3d 20 (2009)), to invoke an inference of common deception, reliance, and injury, Plaintiff must show at minimum that *all* members of the putative class were exposed to the representation. *Pfizer*, 182 Cal. App. 4th at 632. By contrast, certification must be denied if individual inquiries regarding whether each class member was "induc[ed]" by false advertising are required. *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1068 (9th Cir. 2014) ("[C]ertification of UCL claims is available only to those class members who were ***actually exposed*** to the business practices at issue.") (emphasis added); *see also Mazza*, 666 F.3d at 596 ("For everyone in the class to have been exposed . . . it is necessary for everyone in the class to have viewed the allegedly misleading advertising.") (citation omitted). Indeed, even if each putative class member was exposed to one or more of the alleged advertising statements, that fact would not "end the inquiry as to whether common reliance should be inferred." *Campion v. Old Republic Home Prot. Inc.*, 272 F.R.D. 517, 536 (S.D. Cal. 2011). Rather, the common inference is only permitted "when a *specific material misrepresentation of a particular fact was made to each class member* and the claims of all the class members stem from this source." *Id.* at 538 (emphasis added); *see also Knapp v. AT&T Wireless Servs., Inc.*, 195 Cal. App. 4th 932, 943-44 (2011).

a. Determining Exposure to the Representations Would Require Highly Individualized Inquiry.

Plaintiff alleges that ORHP made misrepresentations by a variety of means, including in its Plan, pamphlet, brochure, and on its website. (Br. at 33; *see also* n.14,

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[11] Because Plaintiff seeks restitution, he must demonstrate through common evidence that the class lost money that "may have been acquired" by means of the false advertising, and that should now be restored. BUS. & PROF. CODE §§ 17203 (UCL), 17535 (FAL); *see also Pfizer Inc. v. Super. Ct.*, 182 Cal. App. 4th 622, 632 (Cal. App. 2d Dist. 2010).

infra). While Plaintiff argues these constitute "uniform" and "standardized" advertising materials (Br. at 3-7), he ignores that the materials have different content and are directed to different audiences (*e.g.*, buyers, sellers, and real estate professionals) and he devotes little more than two pages of his brief to an unsuccessful effort to demonstrate—as he must—that all plan-holders were uniformly exposed to them. But Plaintiff may not presume ***exposure***, and since he himself cannot even remember what he saw or when, it is obvious that there is no way to prove exposure for over 2 million other class members.

First, the record shows that some class members were likely not exposed to any ORHP representations at all before their Plan was ordered. Many of the Plans, which are primarily obtained through a real estate transaction, are not purchased by the person listed as the plan-holder. A listing agent might offer a Plan with the home as a selling tool; the buyer's agent might negotiate for the seller to purchase a Plan; the buyer's agent might purchase a Plan for the buyer as a gift; or a Plan may be requested by the home buyer. (Gallagher Dec. ¶ 6.) Here, Plaintiff relied on the recommendation of his real estate agent but he does not recall what the agent said other than recommending ORHP, and he has adduced no evidence regarding the materials that his agent had, used, or may have relied upon,[12] or whether that would be representative of other real estate agents.[13]

Plans also can be purchased directly from ORHP's website. Thus, in many cases the plan-holder does not make the purchasing decision at all, but rather is simply given the Plan as part of the home purchase. Such persons may not have seen ORHP's website or marketing material—or even their Plan—before it was ordered.

Yet, even if each putative class member was exposed to one or more of the alleged advertising statements, that fact would not "end the inquiry as to whether common reliance should be inferred" (*Campion*, 272 F.R.D. at 536), because Plaintiff must show that *all* members of the putative class were exposed to the *same* specific material representation. *Id*. at 538; *see also Pfizer*, 182 Cal. App. 4th at 632; *Gonzalez v. P&G Co.*, 247 F.R.D. 616, 626 (S.D. Cal. 2007). Plaintiff cannot meet this burden. His FAL and UCL claims are not based on a single advertisement or representation, but on a multitude of claimed deceptive ads and representations made through dozens—if not hundreds—of brochures, phone calls, meetings and presentations, website content, and communications through intermediaries such as real estate brokers and agents.[14] Further, ORHP markets and advertises its Plans in different ways to different channels, such that there is variation in exposure and content.

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[12] (*See* Tootell Dec. Ex. F (Pl. Dep. at 46:20-47:7); *see also* section III.D.2 *supra*.)

[13] *See Kaldenbach v. Mut. of Omaha Life Ins. Co.*, 178 Cal. App. 4th 830, 850 (Cal. App. 4th Dist. 2009) (viability of UCL claim would require inquiry into practices employed by a given agent—such as whether she took defendant's training and read its manuals or used the training and materials in sales presentations, and what materials, disclosures, representations, and explanations she gave to a given purchaser).

Moreover, the representations themselves varied and were subject to different caveats and conditions. For example, the Plan itself provided: "[W]e will repair or replace systems and appliances mentioned as covered. We exclude all others. We reserve the right to provide cash in lieu of repair or replacement in the amount of our actual cost (less than retail) to repair or replace such item. Additional charges may apply to certain pairs or replacements . . . We have the sole right to determine whether a covered system, appliance, or component will be repaired or replaced…" (Tootell Dec. Ex. D (Vistalli Dep. Ex. 4).) Thus, anyone who considered an ad referencing repair and replacement in conjunction with the Plan, which provided that repair or replacement was at ORHP's sole discretion, would be in a different position than someone who saw an the ad and only received the Plan later. *See, e.g., Tucker v. Pacific Bell Mobile Servs.*, 208 Cal. App. 4th 201, 221 (Cal. App. 1st Dist. 2012) ("The evidence also reflects that, at least in some instances, the [relevant billing policy] was disclosed to subscribers in the same materials

[14] Plaintiff's Motion focuses on select representations (Br. at 6-8), but the Amended Complaint attacks many more. (*See* Doc. 30 ¶ 54 (attacking as false advertisements promoting "unbiased service;" "reasonable trade call fee[s] on covered items"; "offering comprehensive coverage and quality service at reasonable rates"); *id*. at ¶ 58 (challenging ads and promotions to real estate brokers); *id*. at ¶ 59 (challenging representations that Plans provide "peace of mind" and "convenience"); *id*. at ¶ 60 (challenging ads and promotions to sellers). *See generally id*. at ¶¶ 54-79.)

that Plaintiffs cite in support of their misrepresentation claims. A consumer who saw, or was otherwise aware of such disclosures, could not have been deceived."). In addition, the alleged false representations are not uniformly "material."[15] To the contrary, this Court has already regarded various representations as mere puffery[16] and dismissed Plaintiff's claims of concealment and promissory fraud that involved them. (Docs. 29, 40, 52.) Thus, some of the alleged representations would not be material to any member of the proposed class, much less all of them. And whether a given member of the proposed class viewed representations that are puffery or material will vary. *See In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 129 (2009). "[I]f the issue of materiality . . . is a matter that would vary from consumer to consumer, the issue is not subject to common proof, and the action is properly not certified as a class action.").

In sum, this is not a case where there was a single uniform material representation or omission. Instead, an individualized inquiry is necessary due to the varying means by which misrepresentations are alleged to have been made and the varying ways in which the putative class members acquired their Plans, to determine (at a minimum) when the home warranty was purchased, who purchased it, and whether the plan-holder was exposed to the same materials and representations at the time the Plan was purchased.

Case law supports the conclusion that common issues do not predominate under these circumstances. *See Mazza*, 666 F.3d at 596 (the Ninth Circuit vacated certification of a UCL false advertising class because class members were exposed to "quite disparate information from various representatives of the defendant."); *see also Berger*, 741 F.3d at

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[15] An alleged misrepresentation is judged to be material "if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question." *Kwikset*, 246 P.3d at 892.

[16] "[V]ague or highly subjective" representations regarding a product are too generalized to induce reliance, and instead are mere "puffery." *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 246 (9th Cir. 1990); *see also In re Netflix, Inc. Secs. Litig.*, No. C04-2978 FMS, 2005 U.S. Dist. LEXIS 18765, at *20 (N.D. Cal. June 23, 2005) ("[R]easonable investors do not consider . . . puffery material when making an investment decision"). Further, statements regarding subjective, immeasurable qualities are considered "puffery." *See Rasmussen v. Apple Inc.*, 27 F. Supp. 3d 1027, 1040 (N.D. Cal. 2014) (listing "peace of mind," among other descriptors, as mere puffery).

1068-70 (affirming denial of certification for failure to show that "all of the members of [the] proposed class were exposed to Home Depot's alleged deceptive practices . ."); [17] *O'Shea v. Epson Am., Inc.*, No. CV 09-8063 PSG (CWx), 2011 U.S. Dist. LEXIS 105504 (C.D. Cal. Sept. 19, 2011) (denying motion to certify UCL and FAL claims brought by putative class of consumers who purchased printers containing certain advertising statements, where many putative class members purchased the printers online before they ever saw the box containing the allegedly deceptive statements); *Campion*, 272 F.R.D. at 536 (in denying class certification, explaining that "[t]he fact the alleged misrepresentations were made. . . and a copy of the [Plan] was received by every class member does not . . . end the inquiry as to whether common reliance should be inferred," and holding that proposed class members had varying exposure); *Cohen v. DirecTV, Inc.*, 178 Cal App. 4th 966, 974 (2009) (denying certification and ruling that the plaintiff had "not demonstrated common misrepresentations but instead has culled out select advertisements that may or may not have been seen by the class members.").

Plaintiff's authority does not compel a different result. Indeed, the issues of uniform exposure and the presumption of common deception, reliance, and injury were not analyzed in the cases he relies upon.[18] Plaintiff does not cite to any authority supporting certification of class claims arising from such a wide-range of materials and varying exposure to them.[19]

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[17] Indeed, in *Mazza* and *Berger*, it was undisputed that the information would have been material to the entire class (*see Mazza*, 666 F.3d at 589; *Berger*, 741 F.3d at 1070), yet the Ninth Circuit still rejected certification based on the lack of uniform exposure.

[18] In *Valentino v. Carter-Wallace, Inc.*, the Ninth Circuit vacated a conditional certification order because the district court failed to adequately consider the predominance requirement. 97 F.3d 1227 (9th Cir. 1996). *Hanlon v. Chrysler Corp.*, which approved a class products liability settlement, contain scant predominance analysis and did not address any individualized issues. 150 F.3d 1011, 1022-23 (9th Cir. 1998). In *Meyer v. Portfolio Recovery Associates, LLC*, the Ninth Circuit did not analyze whether there were individualized issues because a relevant FCC ruling mooted the issue. 696 F.3d 943, 948 (9th Cir. 2012). *Kamar v. Radio Shack Corp*. was a labor case in which employee plaintiffs claimed they were required to attend certain meetings but were not paid reporting time pay; there were no dispositive issues under the reporting time regulation that turned on individual employees or timesheets, and the defendant did not dispute that it had common policies concerning meetings for all stores and employees, and meetings compensation, or that meetings were always scheduled in advance and were mandatory. 254 F.R.D. 387, 400-04 (C.D. Cal. 2008). In *Kingsbury v. U.S. Greenfiber, LLC*, which largely addressed arbitration issues, the court noted that "[k]ey to the Court's certification decision" was the fact that the allegedly material omissions were contained

b. Proof of the Claimed Misrepresentation Would Require Highly Individualized Inquiry.

Exposure to the same specific material representation is not the only aspect of Plaintiff's UCL and FAL claims that requires an examination into the specific circumstances of each putative class member's claims. Plaintiff insists that, by virtue of ORHP supposedly uniform business practices—including instructions to its contractors, contractor rankings, assignment of work to contractors, compensation to contractors, claimed failure to ensure contractor qualifications, trade call fees, and recall rates (Br. at Section III.C)— ORHP promised "coverage and characteristics that it did not intend to provide" and that it engaged in "unlawful," unfair" and "fraudulent" conduct. But, as Plaintiff's own transaction and the evidence shows, resolution of these contentions would require a case-by-case analysis.

Beyond the fact that class members were not uniformly exposed, determining the truth or falsity of the claimed representations—*e.g.*, that ORHP promises and delivers both repair ***and*** replacement of covered systems; that customers receive budget

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in a "standard purchase agreement[.]" No. CV08-00151-AHM (AGRx), 2012 U.S. Dist. LEXIS 94854 (C.D. Cal. June 29, 2012). Finally, in *Lane v. Wells Fargo Bank, N.A.*, the court denied certification of a national class based on variations in state law. No. C 12-04026 WHA, 2013 U.S. Dist. LEXIS 87669, at *14 (N.D. Cal. June 21, 2013).

[19] *Cf. Knapp v. AT&T Wireless Servs., Inc.*, 195 Cal. App. 4th 932, 943-46 (Cal. App. 4th Dist. 2011) (denying class certification of UCL claim that wireless service provider misled proposed class as to the number of usable airtime minutes, where some of the alleged misrepresentations were oral and others were made in various written materials; the plans were marketed through different channels; and prospective customers could begin their service in various ways, such that individual inquiry would be required to determine exposure); *Kaldenbach*, 178 Cal. App. 4th at 850 (lack of uniformity in defendants' training materials and other written materials, as well as agents' use of such materials, barred an inference of class injury); *Osborne v. Subaru of Am., Inc.*, 198 Cal. App. 3d 646, 661, 243 Cal. Rptr. 815 (1988) (declining to apply class-wide presumption of reliance to claim of negligent misrepresentation based on defendants' advertising campaign because plaintiffs failed to show that same representation was made to each class member); *Gonzalez v. P&G Co.*, 247 F.R.D. 616, 624 (S.D. Cal. 2007) (same, where class members may have relied on different representations, while some may not have relied on, or even have been exposed to, *any* of them).

protection; that ORHP provides qualified and reliable contractors; and that homes covered by a Plan sell faster and for a higher price—would clearly raise predominant individualized issues. *See Knapp*, 195 Cal. App. 4th at 944–45 (whether members of the putative class—all consumers who had subscribed to a wireless service plan offered by the defendant—were aware of defendant's billing policy of rounding up partially used airtime minutes, and "[w]hether the mere association of a certain number of minutes to a rate plan would … mislead proposed class members necessarily involves individualized inquiries … ."); *see also Tucker*, 208 Cal. App. 4th at 228 ("The rule permitting an inference of common reliance where material misstatements have been made to a class of plaintiffs will not arise where the record will not permit it.").[20]

Here, ORHP is alleged to have falsely represented that it would repair or replace covered items and provide budget protection. But even under Plaintiff's theory, there is no way to determine whether this was false without individualized inquiry. For example, Plaintiff contends that ORHP failed to adequately fix or replace his air conditioner unit, undertaking what Plaintiff claims were at least six failed attempts to repair the unit, and ultimately replacing it with a "lesser quality" air conditioner. (Br. at 20-21.) Resolution of those issues would entail inquiry into, at a minimum, whether: (a) the repairs were appropriate under the circumstances (including, for example, consideration of whether

[20] Plaintiff may not attempt to sustain his false advertising allegations by arguing that ORHP has not shown the challenged representations to be true, as an alleged lack of substantiation will not, standing alone, render any statements false or misleading under the UCL or FAL. *See, e.g.*, *Nilon v. Natural-Immunogenics Corp.*, No. 3:12cv00930-LAB (BGS), 2013 U.S. Dist. LEXIS 141728, at *4 (S.D. Cal. Sept. 30, 2013) ("It is one thing for a plaintiff to say a certain representation is actually untrue or misleading . . . "[i]t is another thing, however, for a plaintiff to say that a certain representation hasn't been shown to be true; that case does not pass go."); *see also Chavez v. Nestle USA, Inc.*, No. CV 09-9192-GW(CWx), 2011 U.S. Dist. LEXIS 58731, at *13-15 (C.D. Cal. May 19, 2011) (dismissing plaintiff's UCL and FAL claim because the primary focus of the complaint was on a supposed lack of substantiation for the advertised attributes); *Stanley v. Bayer Healthcare LLC*, Case No. 11-CV-862, 2012 U.S. Dist. LEXIS 47895, at *3-9 (S.D. Cal. Apr. 3, 2012) (to same effect); *Nat'l Council Against Health Fraud, Inc. v. King Bio Pharm, Inc.*, 107 Cal. App. 4th 1336, 1345, 133 Cal. Rptr. 2d 207 (Cal. Ct. App. 2003) ("The Legislature has expressly permitted prosecuting authorities, but not private plaintiffs, to require substantiation of advertising claims.").

the repairs addressed the same repeated issue or separate issues, or owner damage or negligence); (b) the timeliness of the repairs; (c) whether and at what point the air conditioner became unrepairable; and (d) whether the replacement unit was appropriate. The same individualized inquiry would be necessary with respect to every other member of the proposed class, whose own experiences may have varied between never making a claim, making a claim that was denied, receiving a single needed repair; receiving all needed replacements; receiving repeated repairs and no replacement; and so on.

The ORHP practices that Plaintiff challenges involve hundreds of different contractors and hundreds of thousands of different types of claims and circumstances over a time period going back to 2004. Plaintiff has not come forward with any common, class-wide evidence to prove a uniform policy of claims denial, band-aid fixes, or improper "upselling" and cost-shifting. Plaintiff's attempt to argue that "common evidence" includes the alleged practice of incentivizing contractors to deny claims by ranking the contractors based on the costs charged to ORHP (*see* Br. at 8) is unavailing. This contention is false, but even accepting it on the pleadings, it is subject to variation throughout the period, because contractor pricing and conduct varies. [redacted]

Further, the very evidence relied upon by Plaintiff disproves his class allegations. For instance, to support his argument that ORHP's policies and procedures cause contractors to deny legitimate claims, Plaintiff quotes from a contractor who states that he does not look for ways to deny claims though other contractors do. (Br. at 18 (further citing evidence that ORHP has no way of knowing whether a given contractor is giving accurate information to approve or deny a claim).) Thus, Plaintiff's own evidence shows that whether any given contractor or ORHP improperly denies claims is an individualized question. Indeed, ORHP data shows that the majority of its customers are not denied on a claim (and Plaintiff does not contend that he experienced any improper denial).

Likewise, Plaintiff argues that "common evidence" to support his claims is supplied by ORHP's alleged practice of asking contractors to reduce their repair and replacement costs at the expense of performing quality work, and penalizing contractors who do not comply by giving them "significantly less work." (Br. at 17.) But accepting that contention at face value (and contrary to the evidence), would mean that by definition there are many ORHP contractors who do ***not*** reduce their costs and who perform quality repairs and replacements. Indeed, Plaintiff made numerous claims while he was a plan-holder and yet complains about issues related to his air conditioner only; he concedes that his other claims were handled satisfactorily and did not present concerns about repair, replacement, the contractor, timeliness, the fees charged, or any other issue. Whether a given member of the proposed class encountered a contractor who provided or did not provide quality work—and whether that had any nexus to ORHP's claimed practices—is a highly individualized issue.[21]

c. Plaintiff's Restitution Claim Cannot Be Certified.

Even if Plaintiff could establish a class-wide basis to rescind the class members' home warranty plans, the claim for restitution would require individualized examination.

First, restitution is inappropriate because there is no "class-wide injury." As stated, Plaintiff must demonstrate through common evidence that the class lost money that "may have been acquired" by means of the false advertising, and that should, as a matter of equity, now be restored. BUS. & PROF. CODE §§ 17203 (UCL), 17535 (FAL); *see also Pfizer*, 182 Cal. App. 4th at 632. However, where—as here—putative class members were exposed to disparate information from various sources, or not exposed at all, there is no basis to assume a class-wide injury that should be redressed by a class-wide award of restitution. *Mazza*, 666 F.3d at 596 (consumer who was never exposed to an alleged false or misleading advertising campaign cannot recover damages); *see also Pfizer*, 182 Cal. App. 4th at 631; *Cohen*, 178 Cal. App. 4th at 980; *Campion*, 272 F.R.D. at 536-37 (on

[21] Plaintiff's assertion (based on two isolated emails) that ORHP refuses to pay its contractors "commercially reasonable rates" (Br. at 11 & n.7), or that it forces contractors to accept less than retail market rates (*id*. at 15) raises individualized questions as to how to measure and determine such rate levels in the twenty-two states and thousands of communities in which ORHP offers its services.

virtually indistinguishable facts, Judge Adler refused to certify a UCL class, emphasizing the variable modes of exposure inherent in the home warranty industry, emphasizing the varying degrees of exposure in the real estate channel, in which most of ORHP's Plans are sold). As in these cases, the putative class members here are in myriad positions with respect to their exposure to the representations, and so Plaintiff is not entitled to a common presumption of injury. Further, most ORHP customers' claims are covered. Thus, as in *Pfizer*, Plaintiff is not entitled to class restitution.

Second, Plaintiff cannot show, as he must, that any monetary awards "resulting from th[e] injury" are "measurable on a class-wide basis through use of a common methodology." *Comcast*, 133 S.Ct. at 1430 (internal quotations omitted). *Comcast* requires class certification proponents to provide a workable damages model that explains how to isolate out and "measure only those damages attributable to [the defendant's allegedly wrongful conduct]." *See id*. at 1429. "If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class . . ." *Id.* at 1433; *see also Leyva v. Medline Indus., Inc.*, 716 F.3d 510, 514 (9th Cir. 2013); *Werdebaugh v. Blue Diamond Growers*, No. 12-CV-02724-LHK, 2014 WL 7148923, at *9-14 (N.D. Cal. Dec. 15, 2014) (plaintiff's expert's regression analysis did not adequately isolate impact of the misrepresentations).

While "the presence of individualized damages" may not "by itself, defeat class certification under Rule 23(b)(3)," (*Leyva*, 716 F.3d at 514), courts applying *Comcast* have denied certification where monetary remedies are individualized and the plaintiff does not present a model by which a trial court can "efficiently" calculate "each class member's damages." *Ordonez v. Radio Shack, Inc.*, No. 2:10-cv-07060-CAS(JCGx), 2014 WL 4180958, at *6 (C.D. Cal. Aug. 15, 2014) (*Comcast* not satisfied because "no such records are available" by which to "easily calculate each class member's damages").

Here, Plaintiff would have difficulty proposing, and justifying, any model because it is not clear what injuries Plaintiff complains of, or even suffered himself. In arguing common evidence exists to prove his FAL and UCL claims, he points to at least four different types of injuries class members may have suffered: (1) improper denial of a claim (Br. at 8); (2) overcharge for non-covered costs (*id*. at 9); (3) band-aid fixes (*id*. at 8); and (4) repair rather than replacement. (*Id*.) Plaintiff provides no evidence showing the supposed class uniformly suffered these injuries, much less any one of them. Plaintiff does not even show he suffered any such injuries. (*See id*. at 20-21.) Plaintiff's alleged injury is that after several attempts to fix his air conditioner, ORHP replaced it with a supposedly lesser quality unit (*id*. at 25:23-26), which raises individualized questions.

Plaintiff proposes two possible measures of restitution (Br. at 25:23-26), neither of which bears any relationship to the claimed injuries. Both measures ignore that numerous class members never submitted a claim or (like Plaintiff and like Campion) had claims resolved satisfactorily. The first measure—the return of premiums paid—assumes that no class member received any benefit whatsoever from ORHP. Yet Plaintiff himself renewed his Plan twice and sought to renew a third time [redacted] Similarly, the second measure—the return of premiums less the value of claims paid—assumes erroneously that possessing coverage was worthless and no denials were proper.

Finally, determining entitlement to restitution would require individualized inquiry into who made the purchasing decision and paid for each Plan. ORHP does not keep this information. The inability to determine who "purchased" a Plan, and thus "would be entitled to restitution," was one of the reasons Judge Adler denied certification in *Campion*. *See* 272 F.R.D. at 532. This Court should reach the same conclusion.

d. ORHP's Affirmative Defenses Raise Individualized Issues.

Although the statute of limitations for UCL claims is four years (BUS. & PROF. CODE § 17208) and the statute of limitations for FAL claims is three years,[22] Plaintiff,

[22] There is no specified statute of limitations provision for FAL claims brought by private litigants. However, the catch-all provision of § 338(a) of the Civil Procedure Code that applies to any action upon a liability created by statute other than a penalty or forfeiture would apply and it provides for a three year limitations period.

who filed suit on September 26, 2012, seeks to represent an eight-year class. Accordingly, all the class members before September 26, 2008, and those with FAL claims arising before September 26, 2009 will need to rely on one of the tolling doctrines, which Plaintiff never pled, and which are necessarily fact intensive and highly individualized. *Henson v. Fidelity Nat. Fin.*, 300 F.R.D. 413, 421 (C.D. Cal 2014).[23]

Additionally, customers with Plans beginning in April or May 2013 would be subject to compelled arbitration pursuant to arbitration agreements that ORHP added to its Plans. (*See* Gallagher Decl. at ¶ 4.) [redacted] ORHP would have defenses such as release and waiver in numerous cases.

e. Application of California Law to All States in Which ORHP Does Business Would Cause Legal Issues to Predominate.

To apply California statutes nationwide, Plaintiff must show that: (1) the California legislature intended the statutes to apply to the out-of-state conduct at issue (*Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1207 (2011)), and (2) that ORHP has sufficient contacts with California to satisfy due process (*Washington Mut. Bank FA v. Super. Ct.*, 24 Cal. 4th 906, 919 (2001)). Only if these two criteria are met does the burden shift to ORHP to show that, under choice-of-law principles, another state's laws should apply. *Id*.

Plaintiff seeks to apply two different California statutes—UCL and FAL—nationally (Br. 29-33), but ignores the required element of legislative intent. The California Supreme Court's seminal 2011 opinion in *Sullivan* precludes any such nationwide application. As *Sullivan* explained (addressing UCL), there is a "presumption

[23] While it is debatable whether a class certification denial could toll future class claims (*see Catholic Soc. Servs., Inc. v INS*, 232 F. 3d 1139, 1147 (9th Cir. 2000)), the class definition in *Campion*, which only reached persons *who filed a claim with ORHP* (*Campion*, 861 F. Supp. 2d 1139, 1142 (S.D. Cal. 2012)), is far narrower than Plaintiff's proposed definition of *all persons who purchased or received a Plan*—regardless of whether they filed a claim—such that sorting out any potential tolling effect would be difficult and individualized.

against extraterritoriality." The *Sullivan* court also rejected the very arguments Plaintiff asserts here (*see* Br. at 29) that if a company is headquartered in California, with the underlying corporate decision-making in California, the nationwide application of a California statute is justified. *Id*. at 1208. *Sullivan* specifically distinguished Plaintiff's cited authorities (*Wershba* and *Clothesrigger*) as cases in which the "fraudulent misrepresentations . . . occurred in California." 51 Cal. 4th at 1208, n.10.

While ORHP sells more plans in California than any other state, they are only one-third of the plans sold nationwide by ORHP. (Gallagher Dec. ¶ 14) ORHP sells a large percentage of Plans in two other states, Texas and Arizona. (*Id*.) The interests and due process of all the states and their citizens must be considered before applying California law to them. In addition to its California call center, ORHP also has many customer calls received and handled by a call center in Bartlesville, Oklahoma. (*Id*. at ¶ 15.)

While not addressed by Plaintiff, even if the California legislature intended these statutes to apply nationwide, under governing choice-of-law principles, "the consumer protection laws of the jurisdiction in which the transaction took place" apply to false advertising actions. *See Mazza*, 666 F.3d at 594.

2. Individual Issues of Law and Fact Predominate as to Plaintiff's Throwaway Reference to Claimed Violations of Ins. Code § 332

Plaintiff asserts, without argument or analysis, that ORHP's conduct violated Insurance Code § 332 and thus the "unlawful" prong of the UCL.[24] (Br. at 33:14-18.) Plaintiff offers the conclusion that ORHP "failed to communicate material facts" (*id*. at 33:17-18), without identifying specific facts allegedly omitted, why they would be material, and how they would be susceptible to class-wide proof.

Proof of non-disclosure is generally inconsistent with class treatment, and Plaintiff makes no effort to identify class-wide evidence proving a § 332 violation. Whether any

[24] Plaintiff also seems to allege fraudulent activity as a basis for his UCL claim (Br. at 31:25 – 32:25), but this Court already dismissed Plaintiff's fraud concealment and promissory fraud claims. (Docs. 29, 40, 52.)

failure to disclose was "material" under the Insurance Code is a subjective inquiry. *See* CAL. INS. CODE § 334 ("Materiality is to be determined . . . by the probable and reasonable influence of the facts upon the party *to whom the communication is due* . . . ." (emphasis added); *see also Pringle v. Water Quality Ins. Syndicate*, 646 F. Supp. 2d 1161, 1170, n.6 (C.D. Cal. 2009) ("materiality" under § 334 is a subjective, not objective, inquiry).

The subjective nature of this materiality inquiry precludes class treatment. *See In re WellPoint, Inc.*, No. MDL 09-2074 PSG (FFMx), 2014 U.S. Dist. LEXIS 173903, at *48-49 (C.D. Cal. Sept. 3, 2014) (rejecting § 332 "unlawful" UCL claim because "the materiality of an omission is a subjective inquiry," and therefore class members' "subjective views of materiality do not present a common issue across the class); *Walker v. Life Ins. Co. of the Southwest*, No. CV 10-9198 JVS (RNBx), 2012 U.S. Dist. LEXIS 186296, at *39-40 (C.D. Cal. Nov. 2012) (same). Likewise, the variety of Plan purchasers (*e.g.*, real estate brokers, buyers, sellers), to whom disclosure was allegedly owed, and the varying nature of such disclosure, would be inconsistent with class certification. In *Campion*, class counsel tried to backstop his claims with this very § 332 argument. The Court gave it short shrift, noting that it faced the same classic impediments to certification as the fraud and CLRA claims. *Campion* Doc. 56 at 19, n.3.

3. Plaintiff Cannot Satisfy the Rule 23(b) Superiority

Because individualized issues preclude satisfaction of the predominance requirement set forth in Rule 23(b)(3), the Court need not reach the remaining inquiry of whether the proposed class action is "superior" to the other methods available for adjudicating the controversy. Fed. R. Civ. P. 23(b)(3). Regardless, however, Plaintiff fails to meet this requirement as well. The superiority requirement tests whether class litigation will reduce litigation costs and promote greater efficiency. *Valentino v. Carter Wallace Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). Among other factors, the manageability of the proposed action is an important factor to consider. *See* Rule 23(b)(3)(D). Here it is apparent that the variety of claims, the inability to prove those claims with class-wide evidence, the lack of any class methodology to measure monetary awards tied to class member injuries, and the various individual defenses that would be interposed against a significant percentage of class members all suggest that the proposed class action is not superior. In particular, the ability of plan-holders to file small claims cases or even individual cases or arbitrations when they are actually aggrieved is a far better way to resolve the type of issues Plaintiff seeks to raise here.[25]

C. Plaintiff's Footnote Suggestion that a Class Could Be Certified Under Rule 23(B)(2) Has No Force

Plaintiff admits he "primarily" seeks certification under Rule 23(b)(3) but claims that Rule 23(b)(2) certification is also appropriate. (Br. at 22, fn. 11.) Under Rule 23(b)(2), "[c]lass certification . . . is appropriate only where the primary relief sought is declaratory or injunctive." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1195 (9th Cir. 2001); *see also* Fed. R. Civ. P. 23, 1996 Advisory Committee's Note; *Powers v. Gov't Employees Ins. Co.*, 192 F.R.D. 313, 318 (S.D. Fla. 1998) ("Rule 23(b)(2) class certification is not appropriate where, as here, the relief sought "serves the ultimate goal of monetary restitution and is designed primarily to facilitate . . . monetary relief.").

In *Dukes*, the Ninth Circuit made it clear that for class monetary relief claims to be certified under Rule 23(b)(2), the monetary damages must not be "superior [in] strength, influence, or authority" to the injunctive and declaratory relief sought. 603 F.3d at 616. In other words, certification is inappropriate where monetary relief predominates over declaratory and injunctive relief, as is the case here. Indeed, Plaintiff himself is no longer

[25] Further, various courts have persuasively held that absent class members must have Article III standing and therefore that classes should be defined so as to exclude members who lack standing. *See, e.g., Burdick v. Union Sec. Ins. Co.*, No. CV 07-4028 ABC (JCx), 2009 U.S. Dist. LEXIS 121768, at *7-13 (C.D. Cal. Dec. 9, 2009) (citing cases); *see also Webb v. Carter's Inc.*, 272 F.R.D. 489, 498 (C.D. Cal. 2011) (stating that the *Tobacco II* decision "did not, and could not, hold that uninjured parties could be class members in a class action brought in federal court, despite their lack of Article III standing"). Here, many proposed class members were never exposed to the alleged representations, and therefore could not have been injured, which is yet another reason that class treatment is not superior.

a plan-holder and testified that he has no desire to purchase an ORHP Plan. (Tootell Dec. Ex. F (Pl. Dep. at 135:5-8).) Accordingly, Plaintiff lacks standing to seek injunctive relief for the class. *See Hangarter*, 373 F.3d at 1021-22; *Cattie v. Wal-Mart Stores, Inc.*, 504 F. Supp. 2d 939, 951-52 (S.D. Cal. 2007) (unless the named plaintiff is entitled to seek injunctive relief, he may not represent a class seeking that relief). Thus, as in *Campion*, where the same argument was rejected (*Campion* Doc. 56 at 30 -32), Plaintiff's claim for monetary restitution predominates and may not be certified under Rule 23(b)(2).[26]

D. Plaintiff Cannot Even Satisfy Rule 23(A) Typicality and Adequacy Requirements

The typicality requirement looks to whether "the claims of the class representatives [are] typical of those of the class, and [is] satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) (internal quotation and citation omitted). Here, the members of the putative class would risk suffering an adverse judgment based on findings unique to the named Plaintiff, which is the very result that the "typicality" requirement seeks to avoid.

First, Plaintiff did not order his home warranty plan; Plaintiff's realtor did. Second, Plaintiff's exposure to the alleged representations—or lack of exposure—is atypical. Plaintiff struggles to identify any specific, material misrepresentation that he was exposed to and relied upon before his agent ordered his Plan. Further, as detailed in section III.D.1, Plaintiff was exposed to very little of the material he challenges as false and to the extent exposed, he could not remember what he saw or what he was told.

Third, although Plaintiff points to at least four different types of injuries class members may have suffered—improper denial of a claim; overcharge for non-covered

[26] Indeed, a Rule 23(b)(2) class would improperly "place at risk potentially valid claims for monetary relief," such as a breach of contract claim. *Dukes*, 131 S. Ct. at 2559-60.

costs; band-aid fixes; and repair rather than replacement—Plaintiff himself clearly cannot represent putative class members who experienced all of these claimed harms. Plaintiff does not allege that any of his claims were improperly denied, or that he was overcharged for non-covered costs, and in fact he acknowledges that he received ***both*** repair ***and*** replacement, taking issue only with the quality of the replacement. Further, even as to Plaintiff's complaints regarding the allegedly futile repairs that were done on his air conditioner and the supposedly subpar replacement unit he received, those complaints will be resolved not with evidence that is common to the class, but rather based on findings unique to Plaintiff himself. This is the opposite of typicality.

Plaintiff also must fairly and adequately protect the interests of the class, Fed. R. Civ. P. 23(a)(4), an inquiry that examines, *inter alia*, whether Plaintiff has any conflicts of interest with other class members and whether he will prosecute the action vigorously on behalf of the class. *Hanlon*, 150 F.3d at 1020. As discussed above, Plaintiff's claim for restitution cannot be established on a class wide basis, yet he has little incentive to vigorously pursue injunctive relief on behalf of the class, because he is no longer a plan-holder and does not want to be one. Moreover, because Plaintiff purchased his plan in July 2008 and did not file this suit until November 2012, Plaintiff's initial purchase of the Plan would not even be actionable and would expose him to a unique limitations defense.

E. The Proposed Class Is Not Ascertainable

Although not an explicit requirement of Rule 23, it is well-established that to certify a class, class members have to be ascertainable. *See, e.g., Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013) (citing *Xavier v. Phillip Morris USA Inc.*, 787 F. Supp. 2d 1075, 1090 (N.D. Cal 2011)); *In re POM Wonderful LLC Mktg. & Sales Practices Litig.*, No. ML 10-02199, 2014 U.S. Dist. LEXIS 40415, at *22 (C.D. Cal. Mar. 25, 2014). In order to be ascertainable, the class must be defined with objective criteria and there must be a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition. *Hayes*, 725 F.3d at 355; *see also In re WellPoint*, 2014 U.S. Dist. LEXIS 173903, at *40-42 (citing the *Hayes* standard with approval and denying class certification where plaintiff did not demonstrate that it would be administratively feasible to determine which individuals were in the proposed class, and in fact that determination would require a plan-by-plan analysis).

Here, Plaintiffs seek to certify a class of persons who "purchased" a Plan from ORHP or who received (*i.e.*, was given) a Plan. The members of this class are not ascertainable because Plans are purchased in a variety of ways and ORHP cannot tell, for example whether a real estate agent, a seller or a buyer purchased a Plan and kept it, as opposed to purchasing it and providing it some someone else. Likewise, while ORHP does have a list of its plan-holders, there is no correlation that the person who "received" the Plan was exposed to the allegedly false advertisements or representations that led to its purchase. Indeed, there is abundant evidence that sellers often obtain Plans for short-term and often inexpensive protection, or to gain a competitive edge over other sellers if the Plan is transferable (Gallagher Dec. ¶ 16), and that real estate brokers and agents purchase them to obtain better terms or larger deductibles on their errors and omissions policy. (Tootell Dec. Ex. M (Landsford Dep. at 95:23-96:2).) *See Sanders v. Apple, Inc.*, 672 F. Supp. 2d 978, 991 (N.D. Cal. 2009) (no ascertainability where definition "necessarily include[d] individuals who … did not see or were not deceived by advertisements"). Of course, if Plan recipients were not exposed to the claimed false advertising and did not make the purchasing decision, their identification is irrelevant because they are not entitled to relief. The proposed class is plainly deficient.

V. CONCLUSION

Defendant Old Republic Home Protection Company, Inc. respectfully requests that the Court deny the Motion.

DATED: March 9, 2015

FOLEY & LARDNER LLP
JAY N. VARON
TONY TOOTELL

By: */s/Tony Tootell*
TONY TOOTELL
Attorneys for Defendant Old Republic Home Protection Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2015, I caused the following documents described as: **DEFENDANT OLD REPUBLIC HOME PROTECTION COMPANY, INC.'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION** to be filed electronically with the Clerk of the Court through ECF and that ECF will send an e-notice of the electronic filing to the following.

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_x_ Executed on March 9, 2013, at Los Angeles, California.

_x_ I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

/s/Sandra Franck
Sandra Franck